

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK J. BOOTH,
Plaintiff,

v.

GAVIN NEWSOM, et al.,
Defendants.

No. 2:20-cv-1562 DJC AC P

ORDER

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, seeks relief under 42 U.S.C. § 1983. The case has been referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. Plaintiff's second amended complaint ("SAC") is now before the court for screening. ECF No. 19. For the reasons stated below, plaintiff will be given the opportunity to either proceed on the SAC as screened or amend the complaint a final time.

I. SCREENING REQUIREMENT

A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989) (brackets added); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989) (brackets added) (quoting Neitzke, 490

1 U.S. at 327), superseded by statute on other grounds as stated in Lopez v. Smith, 203 F.3d 1122,
2 1130 (9th Cir. 2000). The critical inquiry is whether a constitutional claim, however inartfully
3 pleaded, has an arguable legal and factual basis. Franklin, 745 F.2d at 1227-28 (citations
4 omitted).

5 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
6 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
7 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550
8 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
9 “Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
10 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v. Rotman,
11 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
12 to state a claim, a complaint must contain more than “a formulaic recitation of the elements of a
13 cause of action;” it must contain factual allegations sufficient “to raise a right to relief above the
14 speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he pleading must contain
15 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
16 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur
17 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

18 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
19 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
20 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
21 content that allows the court to draw the reasonable inference that the defendant is liable for the
22 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this
23 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
24 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the
25 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,
26 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

27 ///

28 ///

1 II. SECOND AMENDED COMPLAINT

2 Plaintiff names the following defendants: California Governor Gavin Newsom; Mule
3 Creek State Prison (“MCSP”) Warden P. Covello; Chief Deputy Warden Holmes; Associate
4 Warden Williams; Facility A Captain Hobbs; Corrections Officer Landreth; Chief Nurse Masbad;
5 and Chief Physician Ball. ECF No. 19 at 1-4. He alleges that his First and Eighth Amendment
6 rights were violated when defendants (1) failed to protect him from contracting COVID-19
7 (Claims One and Three); (2) destroyed his property in retaliation for filing grievances (Claim
8 Two); and (3) failed to provide him with kosher meals (Claim Four). Id. at 5-8.

9 Plaintiff alleges that he contracted COVID-19 as the result of defendants’ failure to
10 protect him. He became very sick and spent two weeks in a great deal of pain. ECF No. 19 at 5,
11 7. Plaintiff lost his voice for several weeks, and he continues to have bad headaches and blurry
12 vision. Id. Plaintiff seeks monetary damages and injunctive relief in the form of kosher meals;
13 single cell housing; the removal of timed showers and toilets; the cessation of housing COVID-10
14 inmates in Building Two; resolution to the overcrowding problem; educational instruction on how
15 COVID-19 spreads; and more sanitary protocols regarding dishware usage. Id. at 9-10.

16 III. DISCUSSION

17 A. Claims for Which a Response Will Be Required

18 1. Claims One and Three: Failure to Protect Health and Safety

19 a. Overview of the Claim

20 Although plaintiff identifies Claim One as involving basic necessities and Claim Three as
21 involving a threat to safety, both of these Eighth Amendment claims turn on defendants’ allegedly
22 inadequate responses to COVID-19. ECF No. 19 at 5, 7. Accordingly, they are both construed as
23 claims of deliberate indifference to inmate health and safety, and are considered together here.
24 Claim One alleges that defendants Covello, Holmes, Williams, Hobbs, Ball, and Masbad
25 generally failed to protect plaintiff from COVID and “encouraged all inmates to get COVID-19.”
26 Id. at 5. Claim Three alleges specifically that Covello, Holmes, Hobbs, and Ball knew that
27 Building Two was unsafe to house COVID-19 inmates because the air vents in the building had
28 no barriers to prevent the spread of the virus from cell to cell. Id. at 7. The SAC’s omnibus

1 statement of facts recites a history of MCSP's COVID-related precautions, policies, and related
2 inmate concerns and complaints from the outset of the pandemic through the filing of the
3 complaint, which support plaintiff's general allegation that all defendants were aware of the
4 dangers of COVID, its means of transmission, and what was required to prevent its spread. See
5 id. at 12-16. The SAC alleges that plaintiff contracted COVID because of defendants' failure to
6 act, and suffers from chronic health problems as a consequence. Id.

7 b. Applicable Law

8 The Eighth Amendment requires prison officials to take reasonable measures to guarantee
9 the safety of inmates. Hudson v. Palmer, 468 U.S. 517, 526-27 (1984). "[A] claimant need not
10 show that a prison official acted or failed to act believing that harm would actually befall an
11 inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial
12 risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 842 (1994); see Lemire v. California
13 Dep't of Corr. & Rehab., 726 F.3d 1062, 1076 (9th Cir. 2013) (objective prong of deliberate
14 indifference may be satisfied by inmate demonstrating he was exposed to substantial risk of some
15 range of serious harm; the harm actually suffered need not have been the most likely result among
16 range of outcomes). Actual knowledge of substantial risk of serious harm can be established by
17 showing that the risk was "longstanding, pervasive, well-documented, or expressly noted by
18 prison officials in the past, and the circumstances suggest that the defendant-official being sued
19 had been exposed to information concerning the risk and thus must have known about it."
20 Farmer, 511 U.S. at 842-48 (internal quotation marks omitted).

21 Whether the substantial risk of harm comes from a single source or from multiple sources
22 does not matter. "The question under the Eighth Amendment is whether prison officials, acting
23 with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious
24 damage to his future health." Farmer, 511 U.S. at 843.

25 c. Discussion

26 Plaintiff's allegations adequately demonstrate that the named defendants were aware of a
27 substantial risk of harm to plaintiff and other inmates from a life-threatening and highly
28 contagious disease during the relevant period. Despite the known risks, defendants failed to

1 implement single cell occupancy, provide clean and effective masks, assess the ventilation system
2 in Building Two before housing sick inmates there, and isolate sick inmates. Defendants' testing
3 policies and work protocols for staff were also inadequate to protect inmates from infection. ECF
4 No. 19 at 22-24 and passim. Plaintiff identifies specific actions taken by the defendants
5 individually which, drawing all inferences in plaintiff's favor, plausibly reflect deliberate
6 indifference to inmate safety in light of the pandemic conditions. Specifically, the SAC alleges as
7 follows:

8 Warden Covello and Chief Deputy Warden Holmes: When the outbreak began at MCSP,
9 defendants Covello and Holmes "stacked inmates" – hundreds of whom were sick – in a gym on
10 bunk beds, instead of building tents for them. ECF No. 19 at 27. Inmates who were sick were
11 throwing up on or around each other. Id. Covello and Holmes permitted staff to work in
12 facilities where individuals had contracted COVID-19 and then turn around and work in facilities
13 with individuals who had not contracted it. ECF No. 19 at 23. This foreseeably contributed to
14 the spread of the virus in different facilities. Id. In December 2020, plaintiff filed a grievance
15 stating that defendant Covello was attempting to create herd immunity by moving inmates to
16 Building Two and placing them with another inmate so they could contract COVID-19. Id. at 21.
17 Although face masks and face shields were distributed to the prisons, the Warden and Chief
18 Deputy Warden failed to ensure that staff wore masks, and they ignored reports that inmates were
19 being given dirty masks that they did not wear. Id. at 22-25. Staff and inmate testing protocols
20 were also defective. Id. It is reasonable to assume for screening purposes that such matters were
21 the responsibility of the Warden and Chief Deputy Warden.

22 Captain Hobbs and Dr. Ball: August 2020, after Building Two had been designated to
23 house quarantined COVID-19 inmates, defendant Hobbs allowed inmates who were assigned to
24 work in Building Two to continue to do so, despite the increased risk of spreading the virus to
25 Facility A, which had no COVID-19 cases at that time, and despite the fact that the Inmate
26 Advisory Council ("IAC")¹ had expressed concerns about the decision. ECF No. 19 at 14. That

27 ¹ Plaintiff was the chair of the IAC at that time. See ECF No. 19 at 22. He states that the IAC
28 (continued...)

1 same month, when the IAC put defendant Ball on notice that nurse employees were disposing of
 2 their masks and other personal protective equipment in the trash and without regard to inmate
 3 workers, defendant Ball responded that the risk of contracting the virus because of those actions
 4 was minimal. Id. at 15. Plaintiff also alleges that defendant Hobbs did nothing after plaintiff told
 5 him that inmates were not receiving disinfectant or days to clean their cells as they had been
 6 promised. Id. at 25.

7 Chief Nurse Masbad: Defendant Masbad enforced a policy requiring inmates to use
 8 “nonreusable” cups that had been placed in a day room and were accessible to the random
 9 handling, coughing, and sneezing of other inmates. ECF No. 19 at 27. In February 2021,
 10 defendant Masbad sent an e-mail to nurses in Building Five to make certain the policy was being
 11 enforced. Id.

12 For purposes of screening, the court concludes that plaintiff has adequately pled an Eighth
 13 Amendment claim against defendants Covello, Holmes, Hobbs, Ball, and Masbad.

14 2. Claim Two: Retaliation

15 a. Relevant Allegations

16 In Claim Two, plaintiff asserts that defendant Landreth retaliated against plaintiff for
 17 using the inmate appeals process and the courts. ECF No. 19 at 6. On August 18, 2020, after
 18 plaintiff had been active for some time in seeking improved institutional response to the COVID
 19 pandemic, Landreth poured water into plaintiff’s typewriter and ripped up some of plaintiff’s
 20 books and papers. During this incident, “Landreth made it clear that the next time that plaintiff
 21 told on [officers] for not wearing their masks... things were going to get really bad for plaintiff.”
 22 Id. at 17. Plaintiff complained about this retaliation and continued his IAC advocacy. On
 23 October 13, 2020, Landreth again destroyed plaintiff’s cell and took allowable property. ECF
 24 No. 20. Landreth specifically told plaintiff that “if he 602ed him he would ‘Fuck [plaintiff] up.’”
 25 Id. at 6; see also id. at 20. Landreth also told plaintiff, “If you file a fuckin lawsuit on me, you

26
 27 “is a lawful council that meets with administration to voice inmate concerns. And [sic] to voice
 28 administration concerns to the inmate population.” Id. at 11 (brackets added).

1 [ain't] seen shit," indicating that plaintiff would get hurt if he filed another grievance against
2 Landreth. Id. at 27.

3 b. Applicable Law

4 Inmates have a First Amendment right to file grievances, and any retaliatory punishment
5 against them for doing so is constitutionally prohibited. See Rhodes v. Robinson, 408 F.3d 559,
6 567 (9th Cir. 2005); Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009) (citations omitted).
7 To state a viable First Amendment retaliation claim, a prisoner must allege that (1) a state actor
8 took some adverse action against him (2) because of (3) that prisoner's protected conduct, and that
9 such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did
10 not reasonably advance a legitimate correctional goal. Rhodes, 408 F.3d at 567-68. Plaintiff
11 must show that the defendant was aware of plaintiff's prior protected conduct and that the
12 protected conduct was "the 'substantial' or 'motivating' factor" behind the defendant's alleged
13 misconduct. Brodheim, 584 F.3d at 1271.

14 c. Discussion

15 Plaintiff's allegations against Landreth are adequate to state a claim for retaliation against
16 him.

17 B. Failure to State a Claim

18 1. Defendant Gavin Newsom

19 Although plaintiff identifies Governor Newsom as a defendant (ECF No. 19 at 1, 3), none
20 of the specific claims for relief name him or present any factual allegations regarding his personal
21 involvement in the specific constitutional violations asserted. See id. at 1-10. Although the
22 governor's response to the pandemic is referenced in the attachment to the SAC (see, e.g., id. at
23 12, 22, 26, 28), these allegations are not linked causally to the actions giving rise to the specified
24 claims. Because plaintiff's allegations against Governor Newsom do not plausibly support a
25 conclusion that he caused the alleged violations of plaintiff's rights, the court finds that the SAC
26 states no claims against him.

27 ///

28 ///

1 2. Defendant Williams

2 Associate Warden Williams is named in Claim One, but the complaint does not contain
3 any allegations showing that this defendant acted with deliberate indifference to inmate safety.
4 The SAC fails to identify any specific action that Williams took which was a cause of the
5 preventable spread of COVID-19 at MCSP. Accordingly, no claim is stated against Williams.

6 2. Claim Four: Free Exercise of Religion

7 Claim Four alleges that Warden Covello deprived plaintiff, who is Jewish, of Kosher
8 meals in violation of his right to freedom of religion. ECF No. 19 at 8. The SAC includes no
9 details regarding MCSP's religious meals program, the history (if any) of plaintiff's participation
10 in it, or the circumstances of his exclusion from it.

11 The right to exercise religious practices and beliefs does not terminate at the prison door.
12 O'Lone v. Shabazz, 482 U.S. 342 (1987). "Inmates . . . have the right to be provided with food
13 sufficient to sustain them in good health that satisfies the dietary laws of their religion." McElyea
14 v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987) (citing Kahane v. Carlson, 527 F.2d 492, 495 (2d
15 Cir. 1975). To establish a free exercise violation, plaintiff must show defendants burdened the
16 practice of his religion, without justification reasonably related to legitimate penological interests,
17 by preventing him from engaging in conduct that is (1) based on a "sincerely held" religious
18 concern and (2) "rooted in religious belief" rather than in secular philosophical concerns. Shakur
19 v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008) (quoting Malik v. Brown, 16 F.3d 330, 333 (9th
20 Cir. 1994)).

21 Plaintiff's allegations are insufficient to state a free exercise claim based on the denial of
22 religious meals. The SAC does not specify who is depriving plaintiff of Kosher meals, and
23 section 1983 establishes liability only for those who cause violations of a plaintiff's constitutional
24 rights. 42 U.S.C. § 1983. The allegation that Warden Covello is *aware* that plaintiff is "not
25 allowed to eat Kosher," ECF No. 19 at 8, does not make him potentially liable for any First
26 Amendment violation. No proper defendant is identified on this claim, and the allegations are too
27 conclusory to make out a constitutional violation.

28 To the extent plaintiff alleges that he is being denied Kosher meals in retaliation for his

1 COVID advocacy and/or for bringing this lawsuit (see id. at 25), such motivation might indicate
2 the absence of a penological justification for the denial. However, no facts have been alleged to
3 show that whoever denied plaintiff's request for Kosher meals did so for an improper purpose.
4 Accordingly, neither a free exercise claim nor a retaliation claim has been stated.

5 IV. OPTIONAL LEAVE TO AMEND

6 For the reasons set forth above, the court finds that the SAC states the following claims
7 for relief, which are suitable for service: (1) Eighth Amendment failure to protect inmate health
8 and safety (Claims One and Three) against defendants Covello, Holmes, Hobbs, Ball, and
9 Masbad; and (2) First Amendment retaliation against defendant Ladreth. The court further finds
10 that the SAC does not state a free exercise of religion claim, or any cognizable claims against
11 defendants Newsom or Williams. It is possible that plaintiff may be able to remedy the defective
12 claims, at least in part. Accordingly, he will be provided a final opportunity to amend the
13 complaint if he so desires.

14 Plaintiff may *either* (1) proceed forthwith to serve defendants Covello, Holmes, Ball,
15 Masbad, Hobbs, and Landreth on the claims identified above, *or* (2) he may delay serving any
16 defendant and amend the complaint.

17 Plaintiff will be required to complete and return the attached notice advising the court how
18 he wishes to proceed. If plaintiff chooses to amend the complaint, he will be given thirty days to
19 file a third amended complaint. If plaintiff elects to proceed on his claims against defendants
20 Covello, Holmes, Ball, Masbad, Hobbs, and Landreth without amending the complaint, the court
21 will proceed to serve the complaint. A decision to go forward without amending the complaint
22 will be considered a voluntarily dismissal without prejudice of all other claims and defendants.

23 If plaintiff chooses to file a third amended complaint, he must demonstrate how the
24 conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo
25 v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must allege in specific terms how
26 each named defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th
27 Cir. 1981). There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link
28 or connection between a defendant's actions and the claimed deprivation. Id.; Johnson v. Duffy,

1 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, “[v]ague and conclusory allegations of official
 2 participation in civil rights violations are not sufficient.” Ivey, 673 F.2d at 268 (citations
 3 omitted).

4 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d
 5 1119, 1125 (9th Cir. 2002). Claims must be set forth in short and plain terms, simply, concisely
 6 and directly. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). Each claim must
 7 identify the defendants against which it is brought; individuals against whom no claim is brought
 8 should not be named as defendants. The facts intended to support each claim should be set forth
 9 under the heading of that claim and should be limited to the facts that are alleged to give rise to
 10 liability. There is no need for an omnibus “Statement of Background Facts,” and plaintiff is
 11 cautioned that his detailed narratives defeat the purpose of stating a claim. See McHenry v.
 12 Renne, 84 F.3d 1172, 1180 (9th Cir. 1996) (complaints should not contain preambles,
 13 introductions, argument, speeches, explanations, stories, griping, vouching, evidence, attempts to
 14 negate possible defenses, summaries, and the like). The court should be able to read and
 15 understand plaintiff’s pleading within minutes. Id. at 1177.

16 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
 17 his first amended complaint complete. Local Rule 220 requires that an amended complaint be
 18 complete in itself without reference to any prior pleading. This is because, as a general rule, an
 19 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
 20 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th
 21 Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled
 22 in subsequent amended complaint to preserve appeal). Once plaintiff files a third amended
 23 complaint, the original complaint no longer serves any function in the case. Therefore, in an
 24 amended complaint, as in an original complaint, each claim and the involvement of each
 25 defendant must be sufficiently alleged.

26 V. PLAIN LANGUAGE SUMMARY OF THIS ORDER FOR A PRO SE LITIGANT

27 You have stated viable claims for relief against defendants Covello, Holmes, Ball, Hobbs
 28 and Masbad for deliberate indifference to COVID-19 risks, and against defendant Landreth for

1 retaliation. You have not, however, presented facts that support a First Amendment claim for the
2 denial of Kosher meals, or any claims against defendants Williams and Newsom.

3 You have a choice to make. You may drop the claims and defendants found unsuitable
4 for service, and have the complaint served on Covello, Holmes, Ball, Masbad, Hobbs, and
5 Landreth right away. In the alternative, you may file a third amended complaint that tries to fix
6 the problems with the defective claims. Whatever you decide to do, you must complete and
7 return the attached Notice on How to Proceed form in order to let the court know your decision,
8 and you must do so within fourteen days.

9 CONCLUSION

10 Accordingly, IT IS HEREBY ORDERED that:

11 1. The Clerk of Court shall send plaintiff a copy of this district's Civil Rights Complaint
12 By a Prisoner form.

13 2. Plaintiff's second amended complaint states the following claims against the following
14 defendants:

15 a. Eighth Amendment failure to protect (deliberate indifference to inmate health and
16 safety) claims against defendants Covello, Holmes, Ball, Masbad, and Hobbs;

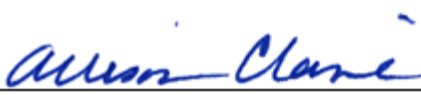
17 b. First Amendment retaliation against defendant Landreth.

18 3. Within fourteen days from the date of this order, plaintiff must return the attached
19 Notice on How to Proceed form indicating whether he wishes to proceed on the second amended
20 complaint as screened herein, or if he wishes to amend the complaint.

21 4. If plaintiff chooses to amend the complaint, he will have thirty days from the date of
22 this order to file an amended complaint. This will be plaintiff's final opportunity to amend the
23 complaint.

24 Plaintiff is cautioned that failure to comply with this order within the periods allotted may
25 result in a recommendation that this matter be dismissed.

26 DATED: June 27, 2023

27 
28 ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK J. BOOTH,

Plaintiff,

v.

GAVIN NEWSOM, et al.,

Defendants.

No. 2:20-cv-1562 DJC AC P

PLAINTIFF'S NOTICE ON HOW TO
PROCEED

CHECK ONE:

_____ Plaintiff would like to proceed immediately on his First and Eighth Amendment claims against defendants Covello, Holmes, Ball, Masbad, Hobbs, and Landreth as construed by the court. Plaintiff understands that by choosing to go forward without amending the complaint, he is voluntarily dismissing his religious meals claim and all claims against defendants Newsom and Williams pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).

_____ Plaintiff would like to amend the complaint.

DATED: _____

PATRICK J. BOOTH
Plaintiff Pro Se